73-782

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

—— Term No. ——

UNITED STATES OF AMERICA, *Respondent*

v.

CHARLES C. HIBBS, *Petitioner*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Petitioner, Charles C. Hibbs, a defendant herein, prays that a Writ of Certiorari issue to the United States Court of Appeals for the Third Circuit to review the judgment of that Court in affirming the Order of the United States District Court for the Eastern District of Pennsylvania.

OPINIONS BELOW

The Memorandum and Order of the United States District Court for the Eastern District of Pennsylvania dated April 9, 1973 denying petitioner's post-trial motions is set forth fully as Exhibit "A". The Judgment Order of the United States Court of Appeals for the Third Circuit dated September 19, 1973 is set forth as Exhibit "B". The undated Order of the United States Court of Appeals for the Third Circuit, entered October 25, 1973, denying the petitioner's petition for rehearing is set forth as Exhibit "C".

JURISDICTIONAL STATEMENT

The Order of the United States Court of Appeals for the Third Circuit was entered on September 19, 1973. The Petitioner's Petition for Rehearing was denied on October 25, 1973. The jurisdiction of this Court is invoked pursuant to the Act of June 25, 1948, C.646, 62 Stat. 928, 28 U.S.C. 1254.

STATEMENT OF THE ISSUES

1. Denial of plea of double jeopardy.

2. Denial of petitioner's constitutional right to be informed of the charges upon which he was tried.

3. Denial of due process of law in that the second indictment failed to state the necessary element of a crime; the proof varied from the allegations in the indictment; the petitioner is not within the class of persons specified by the statute, 18 U.S.C.A. 1010; and the said statute is unconstitutionally vague.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the Constitution of the United States provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment to the Constitution of the United States provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

The facts of the case are as follows:

Petitioner, Charles C. Hibbs, was indicted on or about September 14, 1971, purportedly under 18 U.S.C. §1001 and 18 U.S.C. 2. The indictment contains thirty-nine (39) counts. The said counts are based on the rehabilitation of thirteen (13) properties on the 2900 block of North Marshall Street, Philadelphia, Pennsylvania.

A representative portion of the indictment is contained in the first three counts; thereafter, the first three counts

are repeated thirty-six (36) times. The first three counts, the same as the following thirty-six (36) counts, are as follows:

Count I—From on or about the 1st day of May, 1970, to on or about the 24th day of June, 1970, in the Eastern District of Pennsylvania, CHARLES C. HIBBS and GERALD D. SMITH, knowingly did make and caused to be made a false, fictitious, and fraudulent statement and representation as to material facts in a matter within the jurisdiction of the Federal Housing Administration, an agency of the United States, in that in a certification submitted to the said Federal Housing Administration, GERALD D. SMITH stated and represented and described the condition of the electrical system at 2909 North Marshall Street, Philadelphia, Pennsylvania, whereas in truth and fact, as he then knew, the electrical system was not in such condition.

In violation of Title 18, United States Code, Section 1001,2.

Count II—From on or about the 24th day of June, 1970, in the Eastern District of Pennsylvania, CHARLES C. HIBBS and JOSEPH MATZ, knowingly did make and caused to be made a false, fictitious and fraudulent statement and representation as to material facts in a matter within the jurisdiction of the Federal Housing Administration, an agency of the United States, in that in a certification submitted to the said Federal Housing Administration, JOSEPH MATZ, stated and represented and described the condition of the plumbing system at 2909 North Marshall Street, Philadelphia, Pennsylvania, whereas in truth and in fact, as he then knew, the plumbing system was not in such condition.

In violation of Title 18, United States Code, Section 1001,2.

Count III—From on or about the 28th day of November, 1969, to on or about the 24th day of June, 1970, in the

Eastern District of Pennsylvania, RAYMOND BARRAH, knowingly did make and caused to be made a false, fictitious and fraudulent statement and representation as to material facts in a matter within the jurisdiction of the Federal Housing Administration, an agency of the United States, in that in a certification submitted to the said Federal Housing Administration, RAYMOND BARRAH stated and represented and described the condition of the roof at 2909 North Marshall Street, Philadelphia, Pennsylvania, whereas in truth and fact, as he then knew, the roof was not in such condition.

That on or about the 28th day of November, 1969, to on or about the 24th day of June, 1970, at Philadelphia, in the Eastern District of Pennsylvania, CHARLES C. HIBBS, well knowing the premises aforesaid, did knowingly and unlawfully abet, counsel, induce and procure the commission of the aforesaid offense by the said RAYMOND BARRAH, in the manner and form aforesaid. In violation of Title 18, United States Code Section 1001,2.

The Statutes of 18 U.S.C. 1001 and 18 U.S.C. 2 are as follows:

§1001. Statements or entries generally.

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 749.

§2. Principals.

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, in-

duces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal. June 25, 1948, c. 645, 62 Stat. 684; Oct. 31, 1951, c. 655, §17b, 65 Stat. 717.

It is significant to notice that nowhere in the indictment do the counts contain the word "wilfully" as the statute does. In this respect the petitioner, before trial, raised the insufficiency of the indictment in a motion to dismiss; during trial at the close of the petitioner's case; at the close of prosecutor's case and after trial.

Nevertheless, the prosecutor argued wilfulness of petitioner-Hibbs to the jury and the Court suppressed an objection to argument based on wilfulness and thereafter the Court instructed the jury with respect to wilfullness on six (6) occasions (N. T. pp. 1470, 1475, 1477, 1502).

Further, it is significant to take notice of the fact that only one of the three representative counts charges Hibbs with aiding and abetting the commission of an alleged crime (For instance, Count III). However, with respect to that type of Count, the perpetrator of the alleged crime was not actually indicted nor prosecuted and the prosecutor readily admitted to the Court that the Government had given that person, Raymond Darrah, alias Raymond Barrah, immunity from prosecution; in spite of the fact that Raymond Darrah, alias Raymond Barrah, denied such immunity when he testified under oath in this case against Charles C. Hibbs (N.T. p. 1360).

In any event, the jury failed to consider the logical and reasonable proposition that if the Government has not established beyond a reasonable doubt that the alleged offense was committed, then it must be impossible to find the aider or abettor guilty because there is no guilt upon

which such a decision can be made. *United States v. Barfield*, 447 F.2d 85 (1971).

Gerald D. Smith was not tried in that he pleaded guilty to some of the counts in the indictment and other counts were withdrawn by the Government. Gerald D. Smith also testified against Hibbs and in the course of his testimony it was developed that Smith had, prior to trial, informed the representatives of the Federal Bureau of Investigation that at the time he certified as to the adequacy of the electrical supply for each of the properties herein, he considered the certifications true (N.T., pp. 736, 737). Significantly, this information was concealed from the petitioner until the time of trial.

Joseph Matz was acquitted of giving a false certification as to the plumbing of the properties involved; nevertheless, Charles C. Hibbs was convicted on the same certifications. The Government's proof with respect to the plumbing certifications was the only evidence relating to the truth or falsity of those certifications. The Government's evidence through its witness, Sidney Volov, proved that all of the plumbing in the houses in question had been approved by the appropriate authority of the City of Philadelphia (N.T. pp. 682, 686, 690, 692). The jury apparently disregarded the Government's own evidence and the only evidence in the case concerning the truth or falsity of the plumbing certifications. Since this evidence showed the plumbing certification to be true; the Government failed to prove an essential element of the crime, namely, a false representation with respect to plumbing.

The court in its charge to the jury erroneously outlined the elements of the alleged crime (N.T. p. 1475). Further, the court found that the element of materiality had been determined as a matter of law. In this respect, counsel for petitioner-Hibbs, brought to the attention of the court two Circular letters issued by the F.H.A. under the dates of January 20, 1969 and December 16, 1970, both of which related to the question of materiality. These letters, exculpatory and beneficial, were received by defense counsel for

Hibbs on the last day of trial and he immediately explained their significance to the court. However, the court would not permit testimony to authenticate the said circular letters in spite of the fact that counsel had subpoenaed a witness from Housing and Urban Development who was capable of doing so (N.T. p. 1466). Thus, evidence, beneficial and exculpatory to the petitioner, was concealed and remained undisclosed to the jury. Since the trial, those letters have been authenticated by the legal counsel for Housing and Urban Development and the United States Attorney concedes their authenticity.

Thereafter, petitioner's motion in arrest of judgment was granted on October 17, 1972 and the conviction, in effect, was a nullity. Following the granting of the motion in arrest of judgment, the petitioner was indicted on or about October 25, 1972 purportedly under 18 U.S.C.A. §1010. The indictment contained thirty-nine (39) counts. The counts are based on the rehabilitation of thirteen (13) properties of the 2900 block of North Marshall Street, Philadelphia, Pennsylvania, a representative portion of the indictment is contained in the first three counts: thereafter, the first three counts are repeated thirty-six (36) times and the first three counts, the same as the following thirty-six (36) counts, are as follows:

COUNT I

THE GRAND JURY CHARGES:

On or about the 25th day of June, 1970, in the Eastern District of Pennsylvania, CHARLES C. HIBBS, for the purpose of influencing the action of the Department of Housing and Urban Development, wilfully and knowingly did make, pass, utter and publish, and wilfully cause to be made, passed, uttered and published to the said Department of Housing and Urban Development a false statement, as to material facts, knowing the same to be false, in that in a certification, CHARLES C. HIBBS represented and caused to be represented to the said Department of Housing and

Urban Development, the condition of the electrical system at 2911 North Marshall Street, Philadelphia, Pennsylvania, whereas in truth and fact, as he then knew, the electrical system was not in such condition.

. . . In violation of Title 18, United States Code, Section 1010.

COUNT II

THE GRAND JURY FURTHER CHARGES:

On or about the 25th day of June 1970, in the Eastern District of Pennsylvania, CHARLES C. HIBBS for the purpose of influencing the action of the Department of Housing and Urban Development, wilfully and knowingly did make, pass, utter and publish, and wilfully cause to be made, passed, uttered and published, to the said Department of Housing and Urban Development a false statement, as to material facts, knowing the same to be false, in that in a certification CHARLES C. HIBBS represented and caused to be represented to the said Department of Housing and Urban Development the condition of the plumbing and heating system at 2911 North Marshall Street, Philadelphia, Pennsylvania, whereas in truth and fact, as he then knew, the plumbing and heating system was not in such condition.

In violation of Title 18, United States Code, Section 1010.

COUNT III

THE GRAND JURY FURTHER CHARGES:

On or about the 25th day of June 1970, in the Eastern District of Pennsylvania, CHARLES C. HIBBS, for the purpose of influencing the action of the Department of Housing and Urban Development, wilfully and knowingly did make, pass, utter and publish, and wilfully cause to be made, passed, uttered and published, to the said Department of Housing and Urban Development a false statement, as to

material facts, knowing the same to be false, in that in a certification, CHARLES C. HIBBS represented and caused to be represented to the said Department of Housing and Urban Development, the condition of the roof at 2911 North Marshall Street, Philadelphia, Pennsylvania, whereas in truth and fact, as he then knew, the roof was not in such condition.

In violation of Title 18, United States Code, Section 1010.

The Statute 18 U.S.C. §1010 is as follows:

> Whoever, for the purposes of obtaining any loan or advance of credit from any person, partnership, association, or corporation *with the intent* that such loan or advance of credit shall be offered to or accepted by the Department of Housing and Urban Development for insurance, or for the purposes of paying any extension or renewal of any loan, advance of credit or mortgage insurance by such department, or the acceptance release or substitution of any security on such a loan, advance of credit, or for the purpose of influencing in any way *the action* of such department, makes, passes, utters, or publishes any statement, knowing the same to be false or alters, forges, or counterfeits any instrument, paper or document, or utters, publishes, or passes as true any instrument, paper, or document, knowing it to have been altered, forged, or counterfeited or wilfully over values any security, assets, or income shall be fined not more than $5,000.00 or imprisoned not more than two (2) years or both.

(As amended May 25, 1967, Pub. L. 90-19 Section 24(c), 81 Stat. 28) (Emphasis supplied).

Significantly, the indictment varies from the statute in that the statute requires intent, the indictment is silent

with respect to intent. The court charged the jury with criminal intent as a necessary element of the crime. The court indicated of record that it would cover in its charge all of the points for charge submitted by the petitioner with respect to the necessity of proving criminal intent. However, the prosecution in its memorandum of law contra to the motion to dismiss contended: "the government need not show a fraudulent intent, but must only show that the defendant made, passed, uttered and published a false statement which the defendant knew to be false." The court, in an obvious contradiction, sustained the government's position with respect to the defendant's motion to dismiss.

Title 18, Section I of the United States Code states:

> "Not withstanding any act of Congress to the contrary; (1) any offense punishable by death or imprisonment for a term exceeding one year is a felony."

Thus the crime set forth in 18 U.S.C. §1010 is a felony and in order to indict and in order to convict with respect to a felony, the allegation of intent and proof of intent is an indispensable element of the indictment and the proof. *Morissette v. U.S.*, 342 U.S. 246, 72 S. Ct. 240, 96 L.Ed. 288. *U.S. v. Beard*, 414 F.2d 1014 (3rd C.A. 1969).

In addition, it is important to consider that during the course of the trial, the government proved through oral testimony and by its exhibits one (1) to thirteen (13) inclusive which were offered and accepted in evidence that the certifications in issue were required by the FHA in connection with and as a part of an application for mortgage insurance. The indictment is absolutely silent on the subject of mortgage insurance; this is contrary to the law announced in the case of *Stirone v. U.S.* 361 U.S. 212, 80 S. Ct. 270, 4 L.Ed. 2d 252; *U. S. v. Beard*, 414 F.2d 1014 (3rd C.A. 1969).

The petitioner filed of record, a motion for a bill of particulars which was denied. The bill of particulars among other things asked the government to show who in the Department of Housing and Urban Development received and was influenced in any way for the certifications herein involved. The government did not offer any proof to show when the said certifications were received by the Department of Housing and Urban Development nor did the government prove from whom the certifications were received nor did the government prove that the Department of Housing and Urban Development was influenced in any way by the said certifications; on the contrary, the government did prove that the Department of Housing and Urban Development would not have accepted such certifications if they had been supplied by the seller.

The denial of the bill of particulars made it impossible for the petitioner to adequately prepare his defense in that the indictment was silent with respect to certifications to be used in connection with a mortgage application for mortgage insurance, yet, the government's case was grounded completely upon allegedly false certifications which were submitted in connection with an application for mortgage insurance with respect to each and every one of the properties that are herein involved. The denial of the bill of particulars placed the petitioner in jeopardy without giving him an adequate opportunity to anticipate which aspect of 18 U.S.C. §1010 the government would base its case. The indictment itself gave no indication that the government would base its case upon statements to be supplied in connection with an application for mortgage insurance. Nevertheless, the government proceeded to prove its case on the necessity of certifications designed to induce the FHA to issue mortgage insurance.

The indictment for an additional reason is contrary to the law as announced in *U.S. v. Manuszak*, 234 F.2d 421 (3rd C.A. 1956).

In the *Stirone case, supra*, proof exceeded the limits of the indictment while in the *Manuszak case, supra*, the

indictment failed to assert the essential elements or ingredients of the crime.

The government witness, A. Ciao, testified conclusively that no certifications on roofing, plumbing, heating and electrification would be accepted from the seller. The seller, in this case, is of course the petitioner, CHARLES C. HIBBS. Further, the government offered proof in the form of Exhibit fourteen (14) that the certifications herein at issue will be supplied either by the mortgagee or by the purchaser.

The government's proof showed that all of the plumbing in all the properties here involved was inspected and approved upon a request for a permit made by Joseph Matz, a registered plumber. The government witness, Gerald Smith, testified that when he gave the electrical certifications he considered them satisfactory and he gave them on John Bowes letterhead, a registered electrician, with John Bowes' permission. In this respect, the government's evidence showed that an undefined portion of the electrical work was done by John Bowes and Gerald Smith, working as partners. Finally, the government witness, Raymond Darrah, testified that he put new roofs on all of the houses in question and that he had considerable difficulty with vandals who deliberately slashed the new roofs with knives, broken bottles and sticks which caused holes in the roofs and on one occasion he found an arrow sticking in one of the roofs.

The petitioner was placed in jeopardy under a prior indictment, U.S. District Court, Eastern District of Pennsylvania, Criminal Action 71-520, on the identical facts offered by the government in the case presently before the Court (Criminal Action 72-600) by which he is placed in double jeopardy.

Nevertheless, the petitioner was found guilty by the jury on all thirty-nine (39) counts. Criminal Action 72-600.

Following the verdict, the petitioner filed motions for acquittal, arrest of judgment and for a new trial. All the motions were denied and the petitioner was sentenced

to pay a fine of Five Thousand ($5,000.00) Dollars on each of thirty-nine (39) counts and placed on probation for a period of five (5) years on each count. This is an appeal from the conviction and sentence.

The Honorable trial judge in the case herein in a memorandum and order under the date of December 6, 1972 states: "On October 25, 1972 the defendant was again indicted on the basis of the same facts as were alleged in the first prosecution." The government in its memorandum in opposition to defendant's motion to dismiss the indictment states:

> "The defendant cites no Supreme Court case which stands for the proposition that the defendant had been placed in jeopardy where after trial an order in arrest of judgment is granted. Horn Book Law and case precedent stand in sharp contradiction to the proposition of the defendant."

In this respect, the court's attention is directed to the case of *U.S. v. Sisson*, 399 US 267, 90 S. Ct. 2117 (1970) in which the Court said:

> "The district court characterizes its own decision as an arrest of judgment, and the government seeks review here pursuant to the arrest of judgment provision on the criminal appeal act 18 U.S.C. 3731, an act that narrowly limits the government's right to appeal in criminal cases to certain types. On October 13, 1969 this court entered an order postponing further consideration of the question of jurisdiction to hearing of the case on the merits, 396 US 812, 90 S. Ct. 92, 24 L.E. 2d 65 (1969). For the reasons that we elaborate in what follows, we conclude that the decision below, standing as it does on facts developed at Sisson's trial, *is not an arrest of judgment but instead a directed acquittal.*" (Emphasis supplied)

In addition, the Supreme Court in the *Sisson Case, supra,* stated another compelling conclusion with respect to double jeopardy when it said:

> "The Government takes the risk of all mistakes of its prosecuting officers and the trial judge. . . ."

Therefore, the motion in arrest of judgment, upon the failure of the trial judge to recognize the insufficiency of the indictment and to declare a mistrial, had the effect of an acquittal.

The order in arrest of judgment issued by the trial judge on October 17, 1972, in criminal action no. 71-520, was in effect an order of acquittal because the petitioner was placed in jeopardy as the result of an error on the part of the government in its presentment to the grand jury, and on the part of the trial judge to declare a mistrial rather than permit a trial to proceed upon an indictment that was a nullity.

In criminal action no. 71-520, the petitioner moved to dismiss the indictment before trial and that motion was denied. Motions for acquittal were made during the course of trial and they were refused. With respect to the second motion for acquittal made during the course of trial, the following was stated by defense counsel:

> "So there is no wilfullness alleged and therefore there is no wilfullness proved. So I say to you, sir, the indictment fails because of that."

Thus, it was not simply a matter of a defective indictment but it was a matter of the government being unable to sustain its burden of proof. The government offered a presentment to the grand jury upon which it could not prove, among other elements, the necessary element of the crime; namely, wilfullness.

In the case of *U.S. v. Sisson, supra,* the Supreme Court decided that when the decision depends on facts developed

at the time of trial, the granting of an arrest of judgment is a directed acquittal.

Since the government placed itself in a position which made it impossible for it to prove an indispensable element of the crime, it logically follows that the order of the trial judge of October 17, 1972, was a "directed acquittal."

Moreover, at the time of argument, upon petitioner's motion for acquittal (U.S. District Court criminal action no. 71-520), the United States attorney conceded that petitioner, Hibbs, should be acquitted of the counts in the indictment relating to roofing. Specifically the record on this subject is as follows:

MR. O'BRIEN: Yes, Sir. Thank you sir. If you recall, Your Honor, during the course of trial—and you may not recall and I will try to refresh your recollection—we moved for a motion for acquittal on Counts 6, 9, 12, 15, 18, 21, 24, 27, 30, 33, 36 and 39.

MR. O'BRIEN: Those counts were counts in which the defendant was charged with aiding and abetting Raymond Barrah in the commission of a crime.
Now, Your Honor at the time of the argument had some misgivings about those particular counts, but it never developed in that way.
But I say to you, Your Honor, that—and the cases are in my brief which support this proposition—Barrah was the principal. Hibbs—

MR. LAZIN: Excuse me, Your Honor. I am sorry to interrupt, but I believe that Mr. O'Brien has read my brief.
The Government has conceded that point, sir. It would be a waste of Mr. O'Brien's articulation to argue it.

MR. O'BRIEN: In other words, the government concedes that the motion for acquittal should be granted with respect to 6, 9, 12, 15, 18, 21, 24, 27, 30, 33, 36 and 39.

THE COURT: Is that correct?

MR. LAZIN: Your Honor, I would have to check the numbers, but if it is as to Raymond Barrah, that is correct, Your Honor.

THE COURT: Yes. That is right. That is my understanding.

However, in complete disregard of his own concession of record, the United States attorney reindicted the petitioner upon the same counts on which he conceded that the petitioner should be acquitted. The United States attorney's concession is a concession of acquittal and by any standard or concept applicable to double jeopardy, the petitioner cannot be placed in jeopardy a second time. The government's concession of record cannot be without meaning if the injunction contained in the U.S. Constitution against double jeopardy is to be honored and enforced as a fundamental precept of our system of justice.

REASONS FOR GRANTING WRIT

The Petition for Writ of Certiorari should be allowed for the following reasons:

(a) Because the statute, 18 U.S.C.A. §1010, is unconstitutionally vague in that it does not, upon any interpretation, refer to the petitioner.

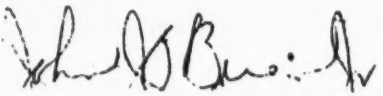
(b) The denial of petitioner's constitutional rights by being placed in jeopardy twice for the same charges based on the identical facts.

(c) Denial of petitioner's constitutional right to be informed of the charges upon which he was tried.

(d) Denial of petitioner's right to due process of law in that both indictments failed to state the necessary elements of any crime but the petitioner over his objections was, nevertheless, forced to undergo trial; that proof at the time of trial varied from the allegations in the indictment; and that the petitioner is not within the class of persons specified by the statute, 18 U.S.C.A. §1010.

A copy of the order and decree of the United States Court of Appeals for the Third Circuit containing no date is attached hereto and identified as Exhibit "C".

Respectfully submitted,



JOHN J. O'BRIEN, JR.
Attorney for Petitioner

APPENDIX

EXHIBIT "A"

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Criminal No. 72-600

UNITED STATES OF AMERICA

v.

CHARLES C. HIBBS

MEMORANDUM AND ORDER

HANNUM, J. April 9th, 1973

Presently before the Court are the motions of the defendant, Charles C. Hibbs, in arrest of judgment, for judgment of acquittal, and/or for a new trial. Combined, the defendant has advanced 64 arguments in support of these motions. Only those that are considered in his brief shall be discussed.

The indictment contained 39 counts. Each count charged the defendant with a separate violation of Section

1010 of Title 18, U.S.C.[1] Among other things, this section makes it a crime for anyone to submit false statements to the Department of Housing and Urban Development for the purpose of influencing in any way the action of such department. Together, the 39 counts relate to certifications issued in the course of the sale of thirteen different houses on the 2900 block of North Marshall Street in Philadelphia. The certifications were issued at various times during the Spring, Summer, and Fall of 1970.

Each count charged that on or about a given date the defendant, for the purpose of influencing in any way the action of the Department of Housing and Urban Development, did knowingly and willfully make, pass, utter, or publish to the said Department of Housing and Urban Development, a false statement, knowing the same to be false, contained in a certification regarding the condition of a given aspect of a given house.

A series of three counts was devoted to each and every house. The first of each series charged that a false certification was submitted regarding the electrical system of that house; the second, that a false certification was sub-

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1. 18 U.S.C. §1010 reads in its entirety as follows:
"Whoever, for the purpose of obtaining any loan or advance of credit from any person, partnership, association, or corporation with the intent that such loan or advance of credit shall be offered to or accepted by the Department of Housing and Urban Development for insurance, or for the purpose of obtaining any extension or renewal of any loan, advance of credit, or mortgage insured by such Department, or the acceptance, release, or substitution of any security on such a loan, advance of credit, or for the purpose of influencing in any way the action of such Department, makes, passes, utters, or publishes any statement, knowing the same to be false, or alters, forges, or counterfeits any instrument, paper, or document, or utters, publishes, or passes as true any instrument, paper, or document, knowing it to have been altered, forged or counterfeited, or willfully overvalues any security, asset, or income, shall be fined not more than $5,000 or imprisoned not more than two years, or both."

mitted regarding the condition of the plumbing and heating system of the same house; and the third, that a false certification was submitted regarding the condition of the roof of the same house. As previously stated, there being three counts per house with respect to thirteen separate houses, a total of 39 counts were set forth in the indictment.

MOTION IN ARREST OF JUDGMENT

In support of his motion in arrest of judgment pursuant to Fed. R. Crim. P. 34, the defendant advances three fundamental arguments. First, that the indictment "failed to contain the necessary element of intent." Second, that there was a variance between the indictment and the government's proofs. And finally, that the indictment failed to state "the purpose for which the defendant criminally intended to influence 'the action' of the Department of Housing and Urban Development."

By his first argument the defendant strips the word "intent" of its generic sense and argues that it is a vocable consisting of six letters that, as a noun, must be typed into the indictment. He asserts that, absent these six letters, the indictment comes apart. This argument, however, is not only unpersuasive, but borders on being sophistic. The offenses described in Section 1010 clearly require proof of more than a general *mens rea;* they require proof of a specific *mens rea*. The words "knowingly," "willfully," and "for the purpose of influencing in any way the action of the Department of Housing and Urban Development" are descriptive of that specific *mens rea*, and the defendant was indicted, tried, and convicted on the basis of such proof. In this regard, neither the indictment nor the proofs offered by the Government violate the teachings of *Morissette v. United States*, 342 U.S. 246, 72 S. Ct. 240 (1952) or *United States v. Beard*, 414 F.2d 1014 (3rd Cir. 1969). By the same token, there is nothing unsound with the decisions in *Watts v. United States*, 394 U.S. 705, 89 S. Ct. 1399 (1969);

United States v. Patillo, 431 F.2d 273 (4th Cir. 1970), they are simply inapplicable to the present case.

The defendant's second argument is equally unpersuasive. The Government's proofs as to the issuance of mortgage insurance were clearly relevant to explaining how the FHA's mortgage insurance program operates. Unlike the defendant, this Court does not read *Stirone v. United States*, 361 U.S. 212, 80 S. Ct. 270 (1960) as preventing the government from offering relevant evidence in explanation of the crime charged. The indictment in this case charged that the defendant, for the purpose of influencing the action of the Department of Housing and Urban Development, willfully and knowingly made, passed, uttered, or published to the Department of Housing and Urban Development false statements, knowing the same to be false. The Government's proofs did not vary from these charges, nor did the Court's charge to the jury.

The defendant's third argument, that the indictment was fundamentally defective because it failed to state "the purpose for which the defendant criminally intended to influence 'the action' of the Department of Housing and Urban Development," is also specious. Again he ignores the plain language of the statute which on its face states that the offense is complete when an individual acts for the purpose of influencing the Department of Housing and Urban Development "in any way." *United States v. Manuszak*, 234 F.2d 421 (3rd Cir. 1956), though sound in its own right, is thus inapplicable. The defendant's subsidiary argument, that the indictment is defective because the defendant does not fall within the class of persons to which the statute applies, is similarly unpersuasive. The statute on its face applies to "whoever" commits the offense.

MOTION FOR JUDGMENT OF ACQUITTAL

The defendant's present conviction is the second of two that he has suffered within the past year. In the first prosecution brought against him, he was convicted of 39

violations of 18 U.S.C. §1001 and §2. Following that trial, he successfully moved to arrest the judgment on the basis of the fact that the indictment failed to allege a necessary element of the crimes charged, namely, that they were committed "willfully." The first conviction having been set aside upon the defendant's motion, on October 25, 1972, he was reindicted. In this, the second prosecution, he was charged with 39 violations of 18 U.S.C. §1010. Prior to trial, he moved to dismiss the indictment on the basis that a second prosecution placed him twice in jeopardy and was therefore violative of the Fifth Amendment. This double jeopardy argument was rejected by a Memorandum and Order dated December 6, 1972. Now, the defendant raises a variation of the same argument. Citing *United States v. Sisson*, 390 U.S. 267, 90 S. Ct. 2117 (1970) he now argues that the granting of his motion in arrest of judgment in the first prosecution was not really that, but rather, a directed acquittal. Although the defendant is quite right that in *Sisson* the grant of what the trial court there labelled as a motion in arrest of judgment was held to constitute the grant of a judgment of acquittal, he is incorrect in his assertion that the arrest of judgment entered in his first prosecution was similarly mislabelled. The rationale in *Sisson* was that the trial court, when granting the defendant's motion in arrest of judgment, went beyond the "face of the record" and relied upon evidence that was developed during the trial. Because a motion in arrest of judgment is properly confined to challenging the sufficiency of the indictment or the court's jurisdiction, the trial court in *Sisson* was held to have directed an acquittal. When the present defendant's motion in arrest of judgment was granted following his first conviction, the trial court's action was based upon a defect in the indictment. It had nothing to do with the proofs developed at trial. The defendant was not acquitted at the conclusion of the first prosecution, and, therefore, has not been twice put in jeopardy this prosecution.

Again raising a double jeopardy argument, the defendant contends that the entry of a judgment of acquittal in the present case is dictated by the cases of *United States v. Jorn*, 400 U.S. 470, 91 S. Ct. 547 (1971); *Downum v. United States*, 372 U.S. 734, 83 S. Ct. 1033 (1963); and *Green v. United States*, 355 U.S. 184, 78 S. Ct. 221 (1957). It has long been held, however, that where a conviction is set aside upon an insufficiency in the indictment and at the insistence of the defendant, a second prosecution is not barred by the Fifth Amendment. *United States v. Tateo*, 377 U.S. 463, 84 S. Ct. 1587 (1964); *United States v. Ball*, 163 U.S. 622, 16 S. Ct. 1192 (1896).

Next, the defendant argues that judgment of acquittal should be granted because the Government failed to prove that the false statements made or passed by the defendant did in fact influence the action of the Department of Housing and Urban Development. Section 1010, however, requires only that false statements be made or passed "for the purpose of influencing" in any way the action of HUD. Nowhere is it stated that the false statements must actually influence the agency. Moreover, unlike Section 1001 of Title 18, U.S.C., which proscribes the making of material false statements to any department or agency of the United States, Section 1010 includes no requirement thus the false statement made or passed must be material. Thus, the defendant's reliance upon *United States v. East*, 416 F.2d 351 (9th Cir. 1969), is misplaced.

MOTION FOR NEW TRIAL

The defendant first asserts that this Court erred in denying his motion for a bill of particulars. He asserts that he was thus prejudiced by an inability to adequately prepare his case; by surprise at the time of trial; and, by a later risk of double jeopardy. In light of the fact that the second prosecution was based almost entirely upon the evidence that the Government produced during the first

trial, the defendant's present claim of inability to prepare and surprise is astounding.

Next, the defendant argues that the Court committed error in precluding defense counsel from cross-examining a Government witness concerning FHA Circular Letter No. 152. The Court's ruling was based upon the fact that the particular Circular Letter was promulgated subsequent to the commission of the offenses charged in the indictment and was, therefore, irrelevant.

The defendant also argues that the Court erred in refusing to grant a mistrial based upon three leading and allegedly prejudicial questions asked by the prosecutor. Defense counsel objected to each as they were made and before the witness had an opportunity to answer. The objection to each question was not only sustained, but the questions themselves were ordered stricken from the record. During the charge, the Court instructed the jury as follows:

> "When the Court has sustained an objection to a question addressed to a witness the jury must disregard the question entirely and may draw no inference from the wording of it, or speculate as to what the witness would have said if he would have been permitted to answer any questions." (N.T. 535).

Thus, even if the questions themselves were arguably prejudicial, the defendant certainly did not suffer sufficient prejudice to justify the grant of a new trial.

Citing *Giglio v. United States*, 405 U.S. 150, 92 S. Ct. 763 (1972) the defendant next contends that the Government failed to inform the jury that two of the Government's witnesses had been guaranteed prosecutorial leniency. This, he argues, is a denial of his right to due process. Were it so, his argument would be colorable. The defendant, has failed to mention who these two witnesses were. Moreover, this Court does not understand *Giglio* to place any more of a burden upon the prosecution than to inform de-

fense counsel of any understandings or agreements the Government may have as to future prosecutions of witnesses. Finally, the critical witnesses used by the prosecution in the present case were the same as those who testified during the defendant's first trial. At that trial, the defendant and his counsel were both informed by the prosecutor of an informal agreement between the Government and the witness Raymond Darrah. It was then disclosed that, should Darrah testify, he would not be prosecuted. Once on notice of this agreement, if defense counsel thought it had any impeachment value, it was his responsibility to raise the matter through cross-examination.

Next, the defendant argues that the Court committed error by precluding defense counsel from cross-examining a Government witness with respect to a particular section of the Code of Federal Regulations. He bases the argument upon the well known fact that the contents of the Federal Register are required to be judicially noticed. 44 U.S.C. §1507. By its ruling, however, the Court did not decline to take judicial notice of the Code of Federal Regulations. The ruling was based upon the fact that the attempted cross-examination was irrelevant and inmaterial.

Further, the defendant contends that the Court erred in admitting expert testimony as to the condition of various aspects of the houses mentioned in the indictment. The expert witnesses examined the houses more than a year after the false statements were made or passed. The defendant argues that the intervening interval of time was so great that the testimony was irrelevent, unmaterial and highly prejudicial. When the condition of an object at a given time is in issue, its subsequent condition is, in human experience, some indication of its probable prior condition. The propriety of the inference that the prior condition was the same as the subsequent proven condition will depend upon the likelihood of intervening circumstances having occurred. The expert testimony that was admitted in the present case concerned the condition of the plumbing, heating, and electrical systems and the right of houses that

presumably had been rehabilitated by the defendant somewhat more than a year earlier. It is well within the realm of human experience that the aspects of these houses to which the Government's witnesses testified should not have changed significantly within such an interval of time. The defendant, as was his right, had an ample opportunity to explain away the effect of the evidence by showing that in the meantime other circumstances had occurred that would suggest that the conditions testified to were not the same as those at the date in issue. The defendant exercised this right at length. Quite apart from such a prerogative, it is clear that the admissibility of such evidence lies in the discretion of the trial court. II Wigmore, Evidence §437 (3d ed. 1940). In this case there was no abuse of that discretion, and certainly no prejudical error in the magnitude complained of by the defendant.

It is next argued that the Court erred in not permitting the defendant to cross-examine a Government witness with respect to "seller/builder" agreements executed by the mortgagee. These agreements were irrelevant to the issues being tried and were, therefore, properly excluded.

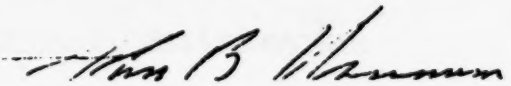
Finally, the defendant argues that the Court erred during the voir dire by refusing to examine the prospective jurors with regard to 53 questions submitted by the defendant. The questions that should be asked upon voir dire examination are a matter within the discretion of the trial court. The questions that were excluded in the present case had either been covered by the Court in its examination or were inmaterial and irrelevant to the issue to be tried by the jury. *United States v. Bamberger*, 456 F.2d 1119 (3d Cir. 1972); *United States v. Owens*, 415 F.2d 1308, 1315 (6th Cir. 1969).

For the foregoing reasons, the motions of the defendant, Charles C. Hibbs, for arrest of judgment, for judgment of acquittal, and/or for a new trial will be denied.

ORDER

AND NOW, this 9th day of April, 1973, it is ORDERED that the motions of the defendant Charles C. Hibbs, in arrest of judgment, for judgment of acquittal, and for a new trial, are hereby DENIED.

AND IT IS FURTHER ORDERED that the United States Probation Office prepare a presentence report.



J.

EXHIBIT "B"

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 73-1011, 73-1491

UNITED STATES OF AMERICA

v.

CHARLES C. HIBBS, *Appellant*

Appeal from the United States District Court for the Eastern District of Pennsylvania.

(District Court Criminal Action No. 72-600)

Under Third Circuit Rule 12(6)

Submitted September 18, 1973

Before: KALODNER, ALDISERT and GARTH, *Circuit Judges.*

JUDGMENT ORDER

After considering the contentions raised by appellant that: (1) the court erred in denying the plea of double jeopardy; (2) the certifications in issue were not material and did not influence the action of the Department of Housing and Urban Development; and (3) the indictment failed to state necessary elements of the offense, the proof

varied from the allegations in the indictment, and the defendant was not within the class of persons specified by 18 U.S.C. §1010, it is

ORDERED AND ADJUDGED that the judgment of the district court be and is hereby affirmed.

By the Court,

Circuit Judge

Attest:

Thomas F. Quinn
Clerk

Dated: September 19, 1973

EXHIBIT "C"

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 73-1011 and 73-1491

UNITED STATES OF AMERICA

v.

CHARLES C. HIBBS, *Appellant*

SUR PETITION FOR REHEARING

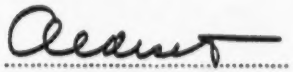
Present: SEITZ, *Chief Judge*, and KALODNER, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges*.

THE PETITION FOR REHEARING FILED BY APPELLANT

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular

active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,



Dated: Judge

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No. 73-782

FILED
FEB 13 1974

In the Supreme Court of the United States

OCTOBER TERM, 1973

CHARLES C. HIBBS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-782

CHARLES C. HIBBS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on 39 counts of an indictment charging submission of false certifications to the Federal Housing Administration (part of the Department of Housing and Urban Development) respecting numerous properties in the City of Philadelphia, in order to influence that agency's action, in viola-

tion of 18 U.S.C. 1010. The court of appeals affirmed without opinion (Pet. App. B).[1]

Evidence at trial showed that petitioner, a real estate speculator specializing in inner city properties, purchased thirteen residential properties in Philadelphia in 1966, thereafter leasing them to low income tenants. In 1969 he decided to sell the properties through the mortgage insurance program of the Federal Housing Administration (FHA). To do so, certain documents relating to each property were required, including a plumbing and heating certification, a roofing certification, and an electrical certification, each such document establishing that the property conformed to FHA standards. Evidence at trial established that petitioner knowingly furnished false certifications for the purpose of influencing the action of the Department of Housing and Urban Development, *i.e.*, for the purpose of procuring FHA-insured mortgages.

Petitioner contends that his conviction should be reversed for alleged defects in the indictment as to the element of intent, for denial by the district court of his motion for a bill of particulars, and because,

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[1] Petitioner had been tried previously on an indictment charging aiding and abetting in the submission of the same false certifications to the Federal Housing Administration, and was found guilty by a jury. Thereafter the district court granted petitioner's post-trial motion in arrest of judgment for failure of the indictment to state the requisite element of willfulness. Following the grand jury's return of a proper indictment, he was convicted in the instant proceeding.

he alleges, he had previously been placed in jeopardy for the same offense.

These claims are fully answered in the opinion of the district court (Pet. App. A) denying petitioner's post-verdict motions. We rely on that opinion in urging that the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1974.

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